FILED
NOV 2 2000
CLERK

(2)

No. 00-509

In The

Supreme Court of the United States

MARILYN ARONS, RUTH WATSON, AND PARENT INFORMATION CENTER OF NEW JERSEY, INC.,

Petitioners,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF DELAWARE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Delaware

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

MICHAEL S. MCGINNISS
Counsel of Record
Disciplinary Counsel
MARY M. JOHNSTON
Chief Disciplinary Counsel
OFFICE OF DISCIPLINARY COUNSEL
200 West Ninth Street, Suite 300-A
Wilmington, DE 19801
(302) 577-7042
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

39pp

QUESTION PRESENTED

Does the Individuals with Disabilities Education Act ("IDEA") clearly manifest a Congressional purpose to supersede the states' historic authority and compelling interest in regulating the practice of law, and require states to permit non-lawyer representation of parties in IDEA due process hearings?

PARTIES TO THIS PROCEEDING

The petitioners in this case are Marilyn Arons, Ruth Watson, and the Parent Information Center of New Jersey, Inc., a non-profit organization with which Ms. Arons and Ms. Watson are affiliated. The respondent is the Office of Disciplinary Counsel of the Supreme Court of the State of Delaware, which is the arm of that court responsible for investigating and prosecuting matters involving the unauthorized practice of law in Delaware. The United States filed a brief *amicus curiae* in the Supreme Court of Delaware in support of Ms. Arons, Ms. Watson, and the Parent Information Center of New Jersey, Inc. The United States is not a party to this proceeding.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THIS PROCEEDING ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

A. The IDEA Does Not Authorize "Individuals With Special Knowledge And Training With Respect To The Problems of Children With Disabilities" To Represent Parties In Due Process Hearings 5

1. Persuasive Third Circuit Case Law Supports The Supreme Court Of Delaware's Interpretation Of The IDEA 5

2. The Department Of Education's Expansive Interpretation Of 20 U.S.C. § 1415(h) Is Not Entitled To Great Deference From This Court 11

B. The IDEA Does Not Preempt The Traditional State Authority To Regulate The Unauthorized Practice Of Law 18

C. The Due Process Clause Of The United States Constitution Does Not Support The Petitioners' Interpretation Of The IDEA 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Alden v. Maine, 527 U.S. 706 (1999) 4

Arons v. New Jersey St. Bd. of Educ., 842 F.2d 58 (3d Cir.), *cert. denied*, 488 U.S. 942 (1988) ..... *passim*

In re Arons, 756 A.2d 867 (Del. 2000) 3

In re Arons, No. UPL-4, 1996 (Del. Bd. on the Unauthorized Practice of Law, Sept. 24, 1999), *aff'd*, 756 A.2d 867 (Del. 2000) 2

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) ..5, 20

California v. ARC Am. Corp., 490 U.S. 93 (1989) 20

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 11, 12

Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 18

Christensen v. Harris Cty., 120 S. Ct. 1655 (2000) 12

Cleary v. Waldman, 167 F.3d 801 (3d Cir.), *cert. denied*, 120 S. Ct. 170 (1999) 12

Coleman v. Thompson, 501 U.S. 722 (1991) 4

Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225 (3d Cir. 1998) 9, 10, 28

Connors v. Mills, 34 F. Supp. 2d 795 (N.D.N.Y. 1998) 25

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 14

TABLE OF AUTHORITIES – Continued

Page

Converse Cty. Sch. Dist. No. Two v. Pratt, 993 F. Supp. 848 (D. Wyo. 1997) 19

Delaware Optometric Corp. v. Sherwood, 128 A.2d 812 (Del. 1957) 4

Delaware St. Bar Ass'n v. Alexander, 386 A.2d 652 (Del.), *cert. denied*, 439 U.S. 808 (1978) 5

English v. General Elec. Co., 496 U.S. 72 (1990) 18

Evans v. Evans, 818 F. Supp. 1215 (N.D. Ind. 1993) 19

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 18

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 20

Geier v. American Honda Motor Co., 120 S. Ct. 1913 (2000) 22

Goldfarb v. Virginia St. Bar, 421 U.S. 773 (1975).... 4, 7, 27

Hines v. Davidowitz, 312 U.S. 52 (1941) 21

Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) 28

Leis v. Flynt, 439 U.S. 438 (1979) 27

Little v. Streater, 452 U.S. 1 (1981) 28

Mathews v. Eldridge, 424 U.S. 319 (1976) 26, 27

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 18, 20, 22, 23, 24

In re Member of the Bar, 257 A.2d 382 (Del. 1969), *appeal dismissed*, 396 U.S. 274 (1970)..... 4

TABLE OF AUTHORITIES – Continued

Page

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973) 20

Middlesex Cty. Ethics Comm. v. Garden St. Bar Ass'n, 457 U.S. 423 (1982) 27

National Fed'n of Federal Employees v. Department of Interior, 526 U.S. 86 (1999) 8

Reno v. Bossier Parish Sch. Bd., 520 U.S. 471 (1997) 8

Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96 (1963) 18

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) ..5, 20

Santosky v. Kramer, 455 U.S. 745 (1982) 28

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 12

Smith v. Robinson, 468 U.S. 992 (1984) 7

Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379 (1963) 16, 17

Town of Burlington v. Department of Educ., 736 F.2d 773 (1st Cir. 1984), *aff'd sub nom. School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985) 19

United States v. Texas, 507 U.S. 529 (1993) 9

Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147 (N.D.N.Y. 1997), *aff'd*, 181 F.3d 84 (2d Cir. 1999), *and aff'd*, 208 F.3d 204 (2d Cir. 2000), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Sept. 25, 2000) (No. 00-6315) 26

TABLE OF AUTHORITIES – Continued

Page

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) 8, 19, 21

Woods v. New Jersey Dep't of Educ., 858 F. Supp. 51 (D.N.J. 1993) 16

Z.A. v. San Bruno Park Sch. Dist., 165 F.3d 1273 (9th Cir. 1999) 16

STATUTES:

National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718 (1966), 15 U.S.C. § 1381 *et seq.* (1988) 22

15 U.S.C. § 1392(a) (1988) 23

Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* 1

20 U.S.C. § 1406(c) 12

20 U.S.C. § 1415(a) 1

20 U.S.C. § 1415(b)(3) 1

20 U.S.C. § 1415(b)(6)-(7) 10

20 U.S.C. § 1415(f)(1) 1, 25

20 U.S.C. § 1415(h)(1) ..... *passim*

20 U.S.C. § 1415(i)(3)(B) 11

20 U.S.C. § 1417(b) 13, 23, 24

Medical Devices Amendments of 1976, 90 Stat. 539 (1976), 21 U.S.C. §§ 306c-360k, 379, 379a & 42 U.S.C. § 3512 (1994) 23

21 U.S.C. § 360k(b) 24

TABLE OF AUTHORITIES – Continued

Page

21 U.S.C. § 371(a) 24

42 U.S.C. § 406(a)(1) 15

49 U.S.C. § 30101 *et seq.* 22

49 U.S.C. § 30111(a) 23

MISCELLANEOUS:

20 C.F.R. §§ 404.1700-1799 15

Letter of Theodore Sky, Acting General Counsel, Department of Education, to the Honorable Frank B. Brouillet, State of Washington (Apr. 8, 1981) 3, 5, 11, 12

S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1470-71 .....8, 14

S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 49 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1503 14

STATEMENT OF THE CASE

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, is intended to "ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C. § 1415(a). Under the IDEA, the parents of a disabled child are entitled to challenge any proposal to change or initiate, or refusal to change or initiate, the identification, evaluation, educational placement or any other aspect of the provision of a free appropriate public education service to that child. *See id.* § 1415(b)(3). When complaints are received, "the parents involved in such complaint shall have the opportunity for an impartial due process hearing." *Id.* § 1415(f)(1). The IDEA also provides that, at this hearing, any party "shall be accorded . . . the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. § 1415(h)(1).

On August 8, 1996, the Office of Disciplinary Counsel ("ODC"), an arm of the Supreme Court of Delaware, filed a petition with the Board on the Unauthorized Practice of Law of the Supreme Court of Delaware (the "Board"), requesting the Board to find that Marilyn Arons, Ruth Watson, and the Parent Information Center of New Jersey, Inc. (hereinafter "petitioners") had engaged in the unauthorized practice of law in Delaware. Petitioners Arons and Watson are non-lawyers with "special knowledge and training with respect to the problems of children with disabilities." Pet. App. A55 (¶ 3). In connection with IDEA due process hearings conducted before the

Delaware Department of Public Instruction ("DPI"), they advised, counseled, and represented at least five Delaware families. Pet. App. A49 (¶¶ 18-19).

The legal issues before the Board were (1) whether the IDEA provides for representation by non-attorneys in Delaware due process hearings convened pursuant to that statute, and if so, whether the IDEA preempts any contrary state statute, regulation or rule; and (2) whether legal, as well as public policy, considerations mandate the conclusion that the petitioners' activities in connection with due process hearings constitute the unauthorized practice of law in Delaware.

The ODC stipulated to certain matters relating to the facts of the underlying cases. The stipulation was filed with the Board on August 6, 1998. Pet. App. A43. Prior to the hearing before the Board on June 23, 1999, the parties agreed to and submitted certain amendments to the stipulation. Pet. App. A54.

On September 24, 1999, the Board issued a written opinion concluding that the petitioners had engaged in the unauthorized practice of law. *In re Arons*, No. UPL-4, 1996 (Del. Bd. on the Unauthorized Practice of Law, Sept. 24, 1999) (Pet. App. A16), *aff'd*, 756 A.2d 867 (Del. 2000). Following the entry of an appeal by the petitioners to the Supreme Court of Delaware, the United States sought leave to appear in that court as an *amicus curiae*, which was granted. The United States Department of Justice filed a brief in support of the petitioners. After briefing was complete, the court heard oral argument.

On July 6, 2000, in an *en banc* opinion, the Supreme Court of Delaware announced its decision that the petitioners had engaged in the unauthorized practice of law. *In re Arons*, 756 A.2d 867 (Del. 2000) (Pet. App. A1). The court held that the IDEA does not authorize non-lawyer representation of parties at IDEA due process hearings. Although the court concluded that the disputed language in 20 U.S.C. § 1415(h) was ambiguous, it found persuasive evidence in the text of the statute, its history in Congress, and relevant case law interpreting the IDEA that supported the ODC's interpretation of the statute. The court also observed that Congress has explicitly included language in other federal statutes to permit lay representation where such a result was intended. Finally, the court considered and rejected an interpretation of the IDEA contained in a 1981 Department of Education letter to the State of Washington, the so-called "Sky Letter."[1] In so doing, the court accorded "modest" deference to the Department of Education's interpretation of the IDEA, which was informal and which was not based upon an express Congressional delegation of authority to elucidate the specific IDEA provision. Moreover, the court pointed out that, even if greater deference were required, "it is doubtful whether that interpretation could withstand the sheer weight of the legal and factual support for the opposite conclusion." Pet. App. A11.

In addition, the court rejected the petitioners' contention that adoption of their interpretation of the IDEA was

---

[1] Letter of Theodore Sky, Acting General Counsel, Department of Education, to the Honorable Frank B. Brouillet, State of Washington (Apr. 8, 1981).

necessary in order to avoid "constitutional entanglements" with the Due Process Clause of the United States Constitution. Pet. App. A12. The court concluded that procedural due process would not be violated by forbidding parents from having non-lawyer representation in hearings under IDEA, noting that, among other things, parties to an IDEA hearing are already provided with substantial procedural safeguards. The court also gave significant weight to the strong governmental interest on the part of the State of Delaware in regulating the practice of law within its borders.

REASONS FOR DENYING THE WRIT

Review by this Court is not warranted. "This is a case about federalism," *Coleman v. Thompson*, 501 U.S. 722, 726 (1991), that is, about respect for "the constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999).

This Court has long recognized that "the States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia St. Bar*, 421 U.S. 773, 792 (1975).[2] It is

[2] The Supreme Court of Delaware has inherent jurisdiction over the governance of the practice of law in Delaware. *In re Member of the Bar*, 257 A.2d 382, 383 (Del. 1969), *appeal dismissed*, 396 U.S. 274 (1970); *Delaware Optometric Corp. v. Sherwood*, 128

also well-established that the states' historic police powers cannot be superseded by federal statute unless that was the "clear and manifest purpose" of Congress in enacting the statute. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 679 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

The statutory interpretations and other legal and public policy arguments proffered by the petitioners (and by the United States in the Sky Letter and as *amicus curiae* in the proceedings below) must be critically evaluated against this backdrop of traditional state authority to regulate the practice of law. Respondent ODC respectfully requests that this Court find the petitioners' arguments for review to be unavailing in light of this compelling state interest.

A. The IDEA Does Not Authorize "Individuals With Special Knowledge And Training With Respect To The Problems of Children With Disabilities" To Represent Parties In Due Process Hearings.

1. Persuasive Third Circuit Case Law Supports The Supreme Court of Delaware's Interpretation Of The IDEA.

In *Arons v. New Jersey State Board of Education*, 842 F.2d 58 (3d Cir.), *cert. denied*, 488 U.S. 942 (1988), the Third

---

A.2d 812, 816-17 (Del. 1957). The court's jurisdiction includes the authority to regulate and proscribe the unauthorized practice of law. *Delaware St. Bar Ass'n v. Alexander*, 386 A.2d 652 (Del.), *cert. denied*, 439 U.S. 808 (1978).

Circuit was called upon to decide whether New Jersey, which had specifically granted "individual[s] with special knowledge or training with respect to the problems of children with disabilities" the authority to represent parents and children with disabilities in IDEA due process proceedings, could enforce a New Jersey rule prohibiting such persons from collecting attorneys' fees. *Id.* at 59-61. Petitioner Marilyn Arons contended that because the IDEA *itself* (and not merely New Jersey law) "confers on parents the right to be represented by a lay advocate," Congress must have intended for lay advocates to charge fees in order to encourage the continued use of such services. *Id.* at 61. The Third Circuit regarded this contention as the "[e]ssen[ce]" of Ms. Arons' argument on appeal, and squarely confronted and rejected it. *Id.*

In refuting Ms. Arons' argument, the Third Circuit concluded that "[t]he carefully drawn statutory language does not authorize these specially qualified individuals to render legal services." *Id.* at 62. The court explained its holding as follows:

> Although the Act does give "[a]ny party to any hearing" the right to "present evidence and confront, cross-examine, and compel the attendance of witnesses," those functions are not designated to be performed by lay advocates. Furthermore, the statute does not use the word "represent" in subsection [(h)(1)], as would be expected if Congress intended to place expert and legal counsel on the same footing.

Id. at 61. The court also pointed out that "[t]he highly specific language of the [IDEA] has led the Supreme

Court to read the statutory provisions narrowly." *Id.* at 62-63 (citing *Smith v. Robinson*, 468 U.S. 992, 1014 (1984)).

The Third Circuit's analysis of the IDEA was further informed by its recognition that "the States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Id.* at 63 (quoting *Goldfarb v. Virginia St. Bar*, 421 U.S. 773, 792 (1975)). The court noted that "[i]n the absence of explicit provisions, we are not convinced that Congress intended to limit the states' traditional control over the practice of law." *Id.* at 63. Because "[n]othing in the statutory language demonstrates a congressional desire to supersede the states' authority to regulate the legal profession," the court concluded that the IDEA does not authorize "individuals with special knowledge" to perform traditional representative functions. *Id.* at 61-62. The non-lawyer adviser may undertake representative functions only if permitted to do so under state law. *Id.* at 62.

The Supreme Court of Delaware found the Third Circuit's analysis of the "federalism issue" in *Arons* to be persuasive. Pet. App. A7. The court also agreed that the Senate Report on the Education for All Handicapped Children Act of 1975 (the forerunner to the IDEA), which described the non-lawyer's role as one of "consultation," provides compelling evidence that Congress did not intend non-lawyers to advocate on behalf of parents in

due process hearings.[3] *See Arons*, 842 F.2d at 62 (noting that Congress distinguished between the duties attributable to "counsel" and "individuals with special knowledge," insofar as the latter's role was to be "one of *consultation*, with emphasis on the responsibility to identify *educational* problems, evaluate them, and determine proper educational placement") (citing S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1470-71) (emphasis added).[4]

---

[3] The Supreme Court of Delaware concluded that the language of 20 U.S.C. § 1415(h)(1) "is ambiguous to the extent it appears to confer joint authority on lawyers and nonlawyers to accompany and advise parents and others affected by the operation of the due process hearings provided under the IDEA." Pet. App. A6. Therefore, the court looked to legislative history to clarify the meaning of the statutory language.

[4] The petitioners cite three of this Court's cases in support of their assertion that this Court has "repeatedly cautioned against the use of committee reports in interpreting statutory language." Pet., at 18-19. No such generalized disparagement of Congressional reports is to be found in those decisions. In each case, there were special circumstances that made the report in question far less reliable than the reports cited by the Supreme Court of Delaware in the case at bar. *See National Fed'n of Federal Employees v. Department of Interior*, 526 U.S. 86, 96 (1999) (report concerned a bill that was not enacted into law); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 483-84 (1997) (footnote in report, where disputed statutory provision was reenacted without change, was unpersuasive evidence that there had been a change in the settled interpretation of the provision); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 609-10 (1991) (two principal committees responsible for the bill were in disagreement over whether it preempted pesticide regulation by political subdivisions).

The petitioners contend that the IDEA "draws no distinction between [lawyers and specialized lay advocates], treating [them] exactly the same." Pet., at 12. However, the petitioners wrongly assume that the IDEA contemplates that "counsel" and "individuals with special knowledge" will necessarily perform identical functions at IDEA due process hearings. In reality, although both categories of persons may "accompan[y] and advise [ ]" parties to such hearings, this language does not require that the subject matter and content of the contemplated "advice" be identical. *See Arons*, 842 F.2d at 62 (discussing the above-quoted language from the 1975 Senate Report).

Moreover, counsel have inherent and presumptive representational authority, while expert educational consultants do not. There is a well-established presumption that Congress is understood to legislate against a background of common-law principles, of which the "rule that a non-lawyer may not represent another person in court is a venerable [one]." *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231-32 (3d Cir. 1998).[5] *See United States v.*

---

[5] In *Collinsgru*, the Third Circuit held that non-lawyer parents of children with disabilities do not have the right under the IDEA to represent their children in the federal courts. In so holding, the court emphasized that, in the absence of strong evidence of Congressional intent to the contrary, the IDEA is to be interpreted in a way that preserves the venerable common-law rule that a non-lawyer may not represent another person in court. The court also based its decision on the following public policy considerations: (1) the "strong state interest in regulating the practice of law"; and (2) the importance of the rights at issue, including the risk that those rights could be prejudiced by a lay representative not qualified in the law or accountable for ethical violations. 161 F.3d at 231.

Texas, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."). The IDEA grants the right to engage in the activities described by 20 U.S.C. § 1415(h)(2) (i.e., presenting evidence, cross-examining witnesses, and compelling the attendance of witnesses) to the *parties*. The IDEA is *silent* as to whether these functions may be performed by a non-lawyer who is not a party to the action. A silent statute can hardly be said to "speak directly" to the question of whether the IDEA supersedes the states' common-law rules on the practice of law by non-lawyers. *See Collinsgru*, 161 F.3d at 231-32.

Finally, as the Supreme Court of Delaware noted in its decision, recent amendments to the IDEA further support an interpretation that the IDEA does not authorize lay representation at due process hearings. Pursuant to these amendments in 1997, one of the safeguards required for agencies receiving federal funds under the IDEA is the adoption of procedures by the agency "that require the parent of a child with a disability, *or the attorney representing the child*, to provide notice" to the state or local educational agency of certain information in connection with a complaint. 20 U.S.C. § 1415(b)(6)-(7) (emphasis added). The word "attorney" is an indisputable reference to a member of the Bar and not a layperson, even if that layperson possesses "special knowledge or training with respect to the problems of children with disabilities." Pet. App. A8-9. In addition, it is relevant to note that Congress, in passing the Handicapped Children's Protection Act of 1986, which created a statutory right to reasonable attorneys' fees and related costs for a

prevailing party at an IDEA due process hearing, did not include any provision granting such fees for lay advocates. *See* 20 U.S.C. § 1415(i)(3)(B); *Arons*, 842 F.2d at 61-62.

2. The Department Of Education's Expansive Interpretation Of 20 U.S.C. § 1415(h) Is Not Entitled To Great Deference From This Court.

Citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the petitioners contend that the Supreme Court of Delaware erred by failing to accord great deference to the views expressed by the United States Department of Education, which advocates an expansive interpretation of 20 U.S.C. § 1415(h), mandating that every state receiving federal IDEA funds permit non-lawyers to represent parents at IDEA due process hearings. The Department's views on this issue were laid out in an informal 1981 policy letter ("the Sky Letter"), and in the United States' brief as *amicus curiae* in the proceeding before the Supreme Court of Delaware.[6]

---

[6] The Sky Letter was written by the then acting General Counsel for the Department of Education, Theodore Sky, in response to a request by the Superintendent of Public Instruction for the State of Washington for a "legal analysis regarding the role of lay advocates in educational agency administrative hearings" under the IDEA. The superintendent had suggested that the IDEA's language indicates that non-lawyers are not in fact authorized to engage in activities conventionally viewed as legal representation, such as examining and cross-examining witnesses. *See* Pet. App. A9-10.

This Court has articulated certain conditions to the exercise of deference to administrative interpretations of federal statutes. Where Congress has not expressly delegated "authority to an agency to elucidate a specific provision of the statute by regulation," deference is due only to a "reasonable" administrative interpretation. Pet. App. A11 (quoting *Chevron*, 467 U.S. at 843-44). Further, less deference is due to informal agency interpretations of federal statutes, such as those expressed in the Sky Letter and the United States' *amicus curiae* brief, than to formal agency regulations adopted after a notice and comment period. *See* Pet. App. A11 (citing *Cleary v. Waldman*, 167 F.3d 801, 807-08 (3d Cir.), *cert. denied*, 120 S. Ct. 170 (1999)). *See also Christensen v. Harris Cty.*, 120 S. Ct. 1655, 1662-63 (2000) (stating that agency interpretations contained in formats such as opinion letters are "entitled to respect," but only to the extent that those interpretations have the "power to persuade") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). *See also* 20 U.S.C. § 1406(c) (1997 amendment to the IDEA, providing that "[t]he Secretary [of Education] may not, through policy letters or other statements, establish a rule that is required for compliance with, and eligibility under, this part without following the requirements" of the Administrative Procedures Act).

Moreover, considered in the context of the traditional state authority to regulate the practice of law, the text and the history of the IDEA reflect that the right to be represented at a due process hearing by a non-lawyer is a "gap" in the statute that has been left by Congress to be filled *by the states*, and not by the Department of Education. *Cf. Chevron*, 467 U.S. at 844-45 (where an agency has

reached a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," courts should not disturb it "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned"). *See also* 20 U.S.C. § 1417(b) (1997 amendment to the IDEA, providing that "[i]n carrying out the provisions of [the IDEA], the Secretary [of Education] shall issue regulations . . . only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this chapter").

The Supreme Court of Delaware was correct in concluding that the Department of Education's views on the interpretation of 20 U.S.C. § 1415(h) were entitled only to "modest deference." Pet. App. A11. Although the Department of Education does have day-to-day responsibility for the IDEA's implementation and enforcement, *see* Pet., at 16, that does not mean that Congress has given the Department's IDEA administrators *carte blanche* to override traditional state regulatory powers, such as the power to regulate the practice of law.

Furthermore, the Supreme Court of Delaware observed that even if it were required to give greater deference to the Department of Education's interpretation of 20 U.S.C. § 1415(h), "it is doubtful whether that interpretation could withstand the sheer weight of the legal and factual support for the opposite conclusion." Pet. App. A11. First, in concluding that the permissible roles of "counsel" and "individuals with special knowledge or training with respect to the problems of children with

disabilities" must be the same, the Department of Education has overlooked the inherent and presumptive representational authority with which counsel are cloaked and non-lawyers are not. Second, the Department has relied heavily on selectively chosen statements made by two Congressional lawmakers in 1975, while placing no weight on the 1975 Senate Report[7] or other aspects of the legislative history that are inconsistent with the Department's reading of the statute.[8] *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) ("Contemporaneous remarks of a single legislator who

---

[7] To this day, the Department has failed to acknowledge the significance of the 1975 Senate Report's description of the role of the "individual[ ] with special knowledge" as being "one of *consultation*, with emphasis on the responsibility to identify *educational* problems, evaluate them, and determine proper educational placement." S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1470-71) (emphasis added).

[8] The Senate Conference Report on the Education for All Handicapped Children Act of 1975 (the forerunner to the IDEA), which explained the provisions of the reconciled bill containing the "accompanied and advised" provision now codified in 20 U.S.C. § 1415(h)(1) of the IDEA, states that in administrative due process hearings a party shall be "accorded (1) the *right to counsel* and to be *advised and accompanied by individuals with special knowledge, training or skills* with respect to the problems of handicapped children. . . . " S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 49 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1503 (emphasis added). This language from the Senate Conference Report, the document from the legislative history which best reflects the considered views of the members of *both* houses of Congress, draws an unambiguous distinction between (1) "counsel" (i.e., persons who are members of the Bar) and (2) specially qualified consultants.

sponsors a bill are not controlling in analyzing legislative history.").

Finally, the Department of Education's emphasis on the fact that lay representation had been authorized by Congress for certain other types of administrative hearings is "puzzling," because "that factor actually supports the opposite conclusion – that Congress knew how to authorize lay representation when it wished to do so." Pet. App. A11-12. The absence of similar language in the IDEA speaks strongly in establishing that Congress chose not to authorize lay representation. *See* Pet. App. A9 (citing 7 U.S.C. § 2020(e)(7), which is the Food Stamp Act provision allowing households in the certification process to "be represented by a person other than a member of the household so long as that person has been clearly designated as the representative . . . and . . . is an adult").[9]

---

[9] The contrast between specific language in the Social Security Act provision on "representation" and 20 U.S.C. § 1415(h) of the IDEA is also quite instructive. For example, 42 U.S.C. § 406(a)(1) states, in part:

> The Commissioner of Social Security may prescribe rules and regulations governing *the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants* before the Commissioner on Social Security.

(Emphasis added). Pursuant to this explicitly and statutorily delegated authority, the Commissioner has adopted specific and detailed regulations governing the conduct of lay "representatives" in Social Security proceedings. *See* 20 C.F.R. §§ 404.1700-1799.

The petitioners attempt to bolster the Department's construction of 20 U.S.C. § 1415(h) by claiming that it is "consistent with the case law on this issue." Pet., at 13 n.3. They cite only *Z.A. v. San Bruno Park School District*, 165 F.3d 1273, 1276 (9th Cir. 1999) (lawyer admitted to bar other than California "could appear as a lay advocate" at an IDEA hearing in California, but could not collect attorneys' fees because of restrictions under state law) and *Woods v. New Jersey Department of Education*, 858 F. Supp. 51, 55 (D.N.J. 1993) (attorney-client privilege attaches to communications between lay advocate and parent during an IDEA hearing). In each of these cases, state law was understood by the federal court as having created a right to non-lawyer representation at IDEA due process hearings. Moreover, unlike the Third Circuit's ruling in *Arons*, the opinions of the courts in these cases contain no substantial analysis of the statutory language and history of 20 U.S.C. § 1415(h).

Finally, in support of its view that the IDEA preempts state authority to prohibit non-lawyer representation at due process hearings, the Department of Education has heavily relied upon this Court's decision in *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963). In *Sperry*, the Florida Bar challenged the right of a layperson to represent clients before the United States Patent Office. This Court rejected the challenge on the ground that Congress had empowered the Commissioner of Patents to prescribe regulations governing the practice by "agents, attorneys, or other persons representing applicants or other parties before the Patent Office." *Id.* at 384. Pursuant to that express statutory authorization, the Commissioner had established two separate registers of persons entitled to

represent applicants seeking patents. One register consisted of names of attorneys; the other listed non-lawyer "agents." *Id.* In *Sperry*, this Court called attention to the long history of practice by non-lawyer agents before the Patent Office and noted the extended Congressional debate over the matter. *Id.* at 388.

Sperry is readily distinguishable from the case at bar. First, unlike the Patent Office (the agency at issue in *Sperry*), DPI is a state, not a federal, agency. Second, there is no time-honored tradition of practice by non-lawyers before DPI, nor did Congress engage in any kind of extensive debate about the activities of lay advisors when it adopted the relevant IDEA provision. Third, the statute at issue in *Sperry* specifically referred to persons "*representing* applicants." *Id.* at 384 n.3 (emphasis added). Here, in contrast, the IDEA states only that a party "may be *accompanied and advised* by counsel and by individuals with special knowledge or training." 20 U.S.C. § 1415(h)(1) (emphasis added). *See Arons*, 842 F.2d at 61-62 (distinguishing *Sperry*).

Neither the language and history of the IDEA reflect that Congress intended to require the states to permit "individuals with special knowledge and training with respect to the problems of children with disabilities" to perform traditional representative functions at IDEA due process hearings. Both the petitioners and the Department of Education disregard the historic and compelling state interest in regulating the practice of law, which has properly informed the construction of 20 U.S.C. § 1415(h) by the Third Circuit and by the Supreme Court of Delaware. Because this construction of the IDEA was correct, review by this Court is not warranted.

B. The IDEA Does Not Preempt The Traditional State Authority To Regulate The Unauthorized Practice Of Law.

The petitioners argue that to the extent Delaware law proscribes their practice of law in due process hearings as unauthorized, principles of federal preemption arising under the Supremacy Clause of the United States Constitution override Delaware's regulatory authority. The Supreme Court of Delaware properly determined that the petitioners' claim of federal preemption was mooted by the court's conclusion that 20 U.S.C. § 1415(h)(1) creates no "clear right to lay representation." Pet. App. A15.

"Preemption fundamentally is a question of congressional intent." *English v. General Elec. Co.*, 496 U.S. 72, 78 (1990). *See also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (noting that " '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case") (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Such intent can either be expressed in the language of the statute itself, or implied. However, "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' " *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

Congress did not expressly preempt state regulation of the practice of law in the context of IDEA due process hearings. Nor do the IDEA or its history reflect that

Congress intended to occupy the entire field with respect to the procedures or the substantive requirements for the provision of educational and related services to children with disabilities. Rather, Congress intended to establish a system of "cooperative federalism" through the IDEA. *See Town of Burlington v. Department of Educ.*, 736 F.2d 773, 785 (1st Cir. 1984), *aff'd sub nom. School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985). "[T]he rule is that the IDEA preempts state law only if the state standards are below the federal minimum." *Converse Cty. Sch. Dist. No. Two v. Pratt*, 993 F. Supp. 848, 854-55 (D. Wyo. 1997) (citing *Evans v. Evans*, 818 F. Supp. 1215, 1223-24 (N.D. Ind. 1993)).

The petitioners have argued that the Supreme Court of Delaware's prohibition against non-lawyer representation at IDEA due process hearings is barred under principles of "implied preemption." Pet., at 23. More precisely, the petitioners are asserting that there is an "implied" *actual conflict* between federal and state law, based upon what has come to be known as "obstacle" preemption. *See generally Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 606-07 (1991) (explaining the distinctions between express preemption, implied "field" preemption, and conflict preemption). As this Court has explained, where Congress "has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it *actually conflicts* with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* (emphasis added). In considering assertions of "conflict" preemption, this Court has emphasized that the

proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973). An emphasis on reconciling state and federal laws and objectives is particularly appropriate in any preemption analysis involving the IDEA, in light of the principles of "cooperative federalism" which the statute reflects.

The petitioners have failed to recognize the well-established presumption against preemption, which is rooted in the concept of federalism and is designed to avoid "unintended encroachment on the authority of the States." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993). Following this presumption, "a court interpreting a statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is the 'clear and manifest purpose of Congress.' " *Id.* at 664 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).[10] In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985).

---

[10] *See also Medtronic*, 518 U.S. at 485 (observing that the presumption against preemption applies "[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied") (internal quotations omitted); *California v. ARC Am. Corp.*, 490 U.S. 93, 101-03 (1989) (relying upon the presumption against preemption, and finding no conflict preemption of state indirect purchaser statutes under the federal antitrust laws based upon an alleged frustration of Congressional purposes).

Absent such limitations, federal administrative agencies would be free to assert preemptive authority over state governments on issues that involve areas of traditional state authority, without the constraint of a clear Congressional mandate.

The Department of Education's view that Delaware's enforcement of its rules on the unauthorized practice of law will frustrate Congress' objectives in enacting 20 U.S.C. § 1415(h) fails to overcome the presumption against preemption, in light of the language and history of the IDEA. As the Supreme Court of Delaware correctly concluded (consistent with the Third Circuit's ruling in *Arons*), the IDEA simply does not create any "clear right to lay representation." (*See* discussion *supra*, section I). Therefore, the IDEA cannot and does not reflect any "clear and manifest purpose" on the part of Congress to supersede the traditional state authority to regulate the practice of law. *Cf. Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 606-15 (1991) (where the text and the legislative history of the federal statute were ambiguous, there was no preemption of local regulation in a subject area involving historic police powers). Moreover, this Court has observed that the doctrine of preemption does not undermine a state's authority to regulate "a distinctive part of a subject which is peculiarly adapted to local regulation," where Congress could have "but did not" regulate that part of the subject. *See Hines v. Davidowitz*, 312 U.S. 52, 68 n.22 (1941). The IDEA includes extensive procedural safeguards in 20 U.S.C. § 1415(h) for the protection of the interests of parties to due process hearings,

but Congress left it for the states – and *not* the Department of Education – to determine whether non-lawyers are permitted to represent parties at the hearings.

In support of their argument for "obstacle" preemption, the petitioners have cited this Court's recent decision in *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000). In *Geier*, this Court held that there is no "special burden" placed on a court's application of ordinary principles of conflict preemption when a federal statute contains an express preemption clause, and that, based upon an analysis of the federal agency standard in question, the injured motorist's state common-law tort action was barred by reason of "obstacle" preemption. *Id.* at 1920-21, 1927. This Court did not call into question the general applicability of the presumption against preemption, or the presumption's particular strength where the federal government has stepped into areas of traditional state authority. *See, e.g., Medtronic*, 518 U.S. at 485 (observing that a presumption against the preemption of state police power regulations is "consistent with both federalism concerns and the historic primacy of state regulation in matters of health and safety").

Furthermore, *Geier* is distinguishable from the case at bar. The Court addressed the preemptive effect of a "passive restraints" standard adopted by the United States Department of Transportation pursuant to its authority under the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act"), 80 Stat. 718 (1966), 15 U.S.C. § 1381 *et seq.* (1988) (current version at 49 U.S.C. § 30101 *et seq.*). The Safety Act broadly delegated to the Department of Transportation the authority to establish motor vehicle safety standards that are "practicable," "meet the

need for motor vehicle safety," and are "stated in objective terms." *See* 15 U.S.C. § 1392(a) (1988) (current version at 49 U.S.C. § 30111(a)). In contrast, the IDEA includes a provision that restricts the ability of the Department of Education to expand upon, through the use of regulation, the "specific requirements" of the IDEA, including the specific requirements contained in 20 U.S.C. § 1415(h).[11] This statutory restriction that Congress has now placed on the Department of Education refutes any suggestion that Congress intends for the Department of Education to engage in expansive inquiries into the underlying "purposes" of 20 U.S.C. § 1415(h), or, based on its conclusions, to mandate additional procedural safeguards that are not found in the language of the statute.

The petitioners' arguments for deference to the Department of Education's views on "obstacle" preemption, based upon this Court's decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), *see* Pet., at 11, 24, are similarly unpersuasive. *Medtronic* involved the preemptive effect on state law of a provision contained in the Medical Devices Amendments of 1976 ("MDA"), 90 Stat. 539 (1976), 21 U.S.C. §§ 306c-360k, 379, 379a & 42 U.S.C.

---

[11] *See* 20 U.S.C. § 1417(b) (1997 amendment to the IDEA, providing that "[i]n carrying out the provisions of [the IDEA] the Secretary [of Education] shall issue regulations under this chapter only to the extent that such regulations are *necessary to ensure that there is compliance with the specific requirements* of this chapter") (emphasis added). Prior to 1997, 20 U.S.C. § 1417(b) had provided that "[i]n carrying out the provisions of [the IDEA], the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations *as may be necessary*." (Emphasis added).

§ 3512 (1994), a statute which is administered by the Food and Drug Administration ("FDA") by delegation of authority from the Secretary of the Department of Health and Human Services ("HHS"). *See Medtronic*, 518 U.S. at 482 n.5, 496. The Court observed that Congress had explicitly delegated to the FDA the authority to exempt state regulations from the preemptive effect of the MDA – "an authority that necessarily requires the FDA to assess the pre-emptive effect that the [MDA] and its own regulations will have on state laws." *Id.* at 496 (citing 21 U.S.C. § 360k(b)).[12] The Court then concluded that "[t]he ambiguity in the statute, and the congressional grant of authority to the agency on the matter contained in it, provide a sound basis for giving substantial weight to the agency's view of the statute." *Id.* at 496 (internal quotations and citation omitted). In contrast, Congress' delegation of regulatory authority to the Department of Education is much less open-ended, consistent with the spirit of "cooperative federalism" that underlies the IDEA. *See* 20 U.S.C. § 1417(b) (both pre- and post-1997, discussed *supra*). Accordingly, *Medtronic* lends little support to the petitioners' argument for deference to the Department of Education's views on "obstacle" preemption.

Finally, it is worth noting that the Congressional mandate contained in the text of the IDEA is that the

---

[12] *See also* 21 U.S.C. § 371(a) (broadly delegating to the Secretary of HHS the authority to promulgate regulations "for the efficient enforcement" of the Federal Food, Drug, and Cosmetic Act), *cited in Medtronic*, 518 U.S. at 496 n.15.

parents of children with disabilities must have an "opportunity for an impartial due process hearing." 20 U.S.C. § 1415(f)(1). The purposes and objectives of Congress expressed in the IDEA are not impeded by Delaware's prohibitions against the unauthorized practice of law. The more reasonable approach is to harmonize the state and federal schemes, so that the states are free to adopt their own rules and regulations concerning the practice of law by non-lawyers at IDEA due process hearings. *See, e.g., Connors v. Mills*, 34 F. Supp. 2d 795, 807 (N.D.N.Y. 1998) (explicit New York state regulation permitting lay representation at IDEA due process hearings); Pet. App. A33 n.6 (report of the Board, quoting the New York regulation).

The Supreme Court of Delaware's decision is consistent with well-established preemption principles, and does not require further review by this Court.

C. The Due Process Clause Of The United States Constitution Does Not Support The Petitioners' Interpretation Of The IDEA.

The petitioners claim that the Supreme Court of Delaware erred by rejecting their argument that a prohibition against non-lawyers representing parents at IDEA due process hearings creates substantial Due Process problems, which can be avoided by construing the statute as requiring states to permit non-lawyer representation. Pet., at 20-22.

In proceedings that may result in the government deciding to withhold a service under the IDEA, the Due Process Clause requires only that the government afford

the child with minimal procedural protections. *See Wenger v. Canastota Cent. Sch. Dist.*, 979 F. Supp. 147, 153 (N.D.N.Y. 1997) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)), *aff'd*, 181 F.3d 84 (2d Cir. 1999), *and aff'd*, 208 F.3d 204 (2d Cir. 2000), *petition for cert. filed*, U.S.L.W. (U.S. Sept. 25, 2000) (No. 00-6315). The complaint and hearing procedures outlined in the IDEA, and adhered to by the State of Delaware (*see* Pet. App. A3, A46-47, and A54-55), more than satisfy the requirements of the Due Process Clause.

Balancing the three factors identified by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court of Delaware observed that, while there is no question of the importance of the individual interests involved in IDEA due process hearings, parties to these hearings "are already provided with substantial procedural safeguards." Pet. App. A13. The court noted that the hearings are conducted in a manner typical of contested, adversarial proceedings, including the direct and cross-examination of witnesses and the required exchange of witness lists and documents in advance of the hearing. Furthermore, the court believed that Delaware's three member panel, consisting of an attorney, an educator in the area of special education, and a layperson with a demonstrated interest in the education of students with disabilities, "affords parents an unbiased hearing" and, coupled with the other procedural safeguards, "adequate structural protection." Pet. App. A14 n.4. The court also agreed with the ODC that the petitioners had "grossly and unfairly" exaggerated the risk that Delaware will deprive children of their individual liberty interests under the IDEA unless the children and their parents are

allowed to be represented by lay advocates. Pet. App. A13. Moreover, the court found that the record did not support the petitioners' assertion that parents and children would be denied access to "the only assistance available to them" if non-lawyer representation was not permitted. Pet. App. A14.

The Supreme Court of Delaware also properly considered the compelling state interest in regulating the practice of law as an important factor in the application of the *Mathews* balancing test. The court concluded that any potential benefit that some individual parents and children may obtain through the services of lay advocates was significantly outweighed by the court's compelling interest in ensuring that "the public will enjoy the representation of individuals who have been found to possess the necessary skills and training to represent others." Pet. App. A13-14.

This Court has recognized that "the states have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia St. Bar*, 421 U.S. 773, 792 (1975). *See Middlesex Cty. Ethics Comm. v. Garden St. Bar Ass'n*, 457 U.S. 423, 434 (1982) (noting that states have an "extremely important interest" in the regulation and licensing of attorneys); *Leis v. Flynt*, 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the

District of Columbia within their respective jurisdictions.").[13] The Supreme Court of Delaware's decision to prohibit non-lawyer representation at IDEA due process hearings was fully consistent with its broad authority to regulate in this area of traditional state power.

The petitioners' reliance upon cases such as *Santosky v. Kramer*, 455 U.S. 745 (1982), *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), and *Little v. Streater*, 452 U.S. 1 (1981), only serves to highlight the weakness of their Due Process argument. In *Santosky*, the Court required a minimum evidentiary standard of "clear and convincing evidence" for the termination of parental rights. 455 U.S. at 769-70. *Lassiter* also involved the termination of parental rights, and the Court held that the failure of the state to appoint counsel for indigent parents did not violate the Due Process Clause under the circumstances of that case. 452 U.S. at 31-32. *Little* involved "the creation of a parent-child relationship" in paternity proceedings, and the Court held that Due Process prohibited the denial of blood grouping tests to an indigent defendant. 452 U.S. at 16. The petitioners have failed to identify any case in which this Court has held that the Due Process Clause requires a state, which has implemented formal, adversarial hearing procedures for resolving disputes about the provision of government benefits or services pursuant to a federal statute, to allow non-lawyers

---

[13] *See also Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231 (3d Cir. 1998) (citing "the strong state interest in regulating the practice of law" as an important consideration in rejecting an alleged right of a parent to represent a child in IDEA proceedings in federal court).

to engage in traditional representative functions at such hearings.

The petitioners have fallen far short of demonstrating that the Supreme Court of Delaware's decision in *Arons* creates any "entanglement" with the requirements of Constitutional Due Process.

CONCLUSION

Review by this Court of the *en banc* decision of the Supreme Court of Delaware is not warranted. That court correctly construed the disputed language found in 20 U.S.C. § 1415(h), concluding that neither the text nor the history of the IDEA reflect that Congress intended to require the states to permit "individuals with special knowledge or training with respect to the problems of children with disabilities" to represent parties in IDEA due process hearings. Having found no "clear right to lay representation" in the IDEA, Pet. App. A15, the court properly determined that the petitioners' claim of federal preemption was moot. This Court's precedents do not support the petitioners' argument for "obstacle" preemption, particularly in an area of traditional state authority such as the regulation of the practice of law. Finally, the requirements of the Due Process Clause are more than satisfied by the procedural safeguards implemented by the State of Delaware pursuant to the IDEA. In furtherance of the state's compelling interest in regulating the practice of law, the Supreme Court of Delaware determined that the petitioners were not authorized to represent parents in IDEA due process hearings. This Court

should reject the petitioners' invitation to use the Due Process Clause as justification for expanding federal authority under the IDEA beyond the language of the statute.

For the foregoing reasons, the respondent ODC respectfully requests that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

MICHAEL S. MCGINNISS
Counsel of Record
Disciplinary Counsel
MARY M. JOHNSTON
Chief Disciplinary Counsel
OFFICE OF DISCIPLINARY COUNSEL
200 West Ninth Street, Suite 300-A
Wilmington, DE 19801
(302) 577-7042

Attorneys for Respondent

Dated: November 2, 2000